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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

GLOVER ALLISON,

Appellant

vs.

FULTON-DEKALB HOSPITAL AUTHORITY,

Appellee

CASE NO. 79-6743

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

CASE NUMBER 35689

APPELLANT'S RESPONSE TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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I. Introduction.

Appellant Allison wishes to respond to four matters raised in Appellee's just-filed Motion to Dismiss or Affirm. Of course, the response to some of the arguments made in that motion is contained in the original Jurisdictional Statement (and application for certiorari), and Allison will not attempt to repeat any of those arguments here.

II. Two of the Matters Set Forth in Appellee's Statement of Facts Are Misleading.

At the risk of burdening this brief with trivia, Appellant proposes to clarify two misleading statements contained in the Statement of Facts section of Appellee's brief. The first is its mention (at page 3) of the fact that Appellant obtained four continuances of the case before it was brought to trial. We do not wish this Court to have the impression that those continuances were some sort of delaying tactic, especially since the Georgia Supreme Court has treated Appellant's constitutional argument as though it had been raised for such a reason. On the contrary, the reasons for the four continuances, as related to the undersigned by trial counsel, were: First continuance: to permit Appellee more time to reply to outstanding interrogatories, which had not been timely answered; Second and Third continuances: to allow the parties time to get the father of the child (Appellant's "illegitimate son-in-law") to agree in writing to pay Appellee's bill (which proved futile); Fourth continuance; to permit one of Appellant's witnesses (the mother of the child) to come from Michigan to Georgia to testify at the trial, where inclement weather had closed the court entirely on the scheduled trial day and the witness could not arrange transportation. Opposing counsel agreed to all four continuances. Of course, since Appellee's counsel in this appeal was not trial counsel in the case, they may well have been unaware of the above facts. The second misleading statement, at the top of page 4, suggests that the Georgia Supreme Court actually made some decision on the merits of Appellant's constitutional argument. A perusal of that opinion will easily dispel any such notion.

III. This Court Has Jurisdiction of the Appeal.

Although Part I of the Argument section of Appellee's brief is entitled "No Substantial Federal Question is Present," the substance of the argument is that this Court lacks jurisdiction of the appeal because the Georgia statute involved was repealed and replaced pendente lite. Such a contention in the context of this appeal is utterly without foundation, and the cases relied upon by Appellee are irrelevant to the matter.

In both Bruner and McCardle--the only two cases relied upon by Appellee for this argument--the statute repealed pendente lite was not the substantive statute under legal challenge, but the law giving the court jurisdiction to hear the dispute at all. Plainly, the Georgia Legislature neither did, nor could, enact any statute affecting the jurisdiction of this Court to hear a constitutional challenge to a Georgia statute, nor did they make any attempt to prevent any state court from doing so. Thus when they replaced the law under challenge with a new law applicable to obligations incurred after April 1979, they did nothing at all to affect the jurisdiction of this Court to hear a constitutional challenge to the law as it formerly existed. The most that Appellee could even logically argue is that the change mooted the appeal, which they have in fact done in the next section of their brief, to which we respond in a moment. The jurisdictional argument, however, is frivolous.

IV. This Appeal is Not Moot.

Appellant certainly does not quarrel with the general proposition urged in Part II of Appellee's brief that a present, live controversy must exist between the parties in order for this Court appropriately to rule on the appeal. Unfortunately, the repeal of the law under challenge and its replacement with a new law has in no way terminated the dispute between the parties, or, indeed, between any parties to a claim that arose before April 1979. Appellant would be only too happy for Appellee to acknowledge that the repeal of former Ga. Code Ann. §74-105 leaves it

without any legal claim against him, in which event this controversy would surely be moot. But Appellee has done no such thing. On the contrary, it has continued actively to pursue its money claim against Appellant, and, should it prevail in this Court, presumably intends to enforce its judgment by all means available to it under Georgia law. Thus the controversy is every bit as "live" as it was when this lawsuit was first filed several years ago.

The case cited by Appellee for the proposition that this Court must ordinarily apply the law in effect at the time of its decision are inapposite. California Bankers Association v. Shultz, 416 U.S. 21 (1974) was an effort to enjoin as unconstitutional certain proposed banking regulations that were voluntarily modified by the defendant without ever having been put into effect in their original form. This Court merely held that the plaintiffs could not question the constitutionality of rules that had not taken, and for all that appeared never would take, effect. In the instant case, Appellant is challenging a statute that was actually applied against him and continues to be the only basis upon which Appellee predicates its liability against him. Kremens v. Bartley, 431 U.S. 119 (1977) was a class action challenge to parents' rights to mental commitment of minors by plaintiffs, all of whom were at least 15 years old when suit was filed. Pendente lite the statute was changed to remove from its coverage all minors over the age of 13. Since every named Plaintiff could therefore gain immediate release from confinement, and was therefore unaffected by any existing statute, their affirmative action for injunctive relief was plainly moot. Here, Appellant is defending a claim for damages founded expressly on the old statute, so that he is anything but unaffected by it. In Fusari v. Steinberg, 419 U.S. 379 (1975), neither counsel had even bothered to inform this Court that a new statute had been passed during the appeal, much less to explain the effect of that statute. This Court understandably felt obliged to remand so that that information could be provided and considered by the courts below to determine whether or not a continuing controversy still existed. Here, neither the content of the new statute, nor the issue of continuing controversy, is at all in doubt. Finally, Thorpe v.

Housing Authority of Durham, 393 U.S. 268 (1969) sought to establish a constitutionally--based Due Process right to notice to public housing tenants of the landlord's reasons for evicting them. Pendente lite a federal regulation was passed granting the same rights as a matter of law, though not specifying whether or not it would operate retroactively. Since the retroactivity question of this federal regulation was "necessarily governed by federal law," (393 U.S. at 281-2), and since applying it retroactively would avoid a constitutional question, this Court resolved the dispute by applying the regulation retroactively. In the instant case a state, not a federal, law is in question, and there is no need for this Court to speculate about whether or not the new law was meant to apply retroactively because the Georgia legislature has spoken on the subject. In Section I of the amending act as set forth in the Editorial Note to amended Ga. Code Ann. §74-105 (attached as Appendix "A" to this brief), the legislature clearly stated that the law would not be retroactive unless the state or federal constitution absolutely required it. Thus no court can make any decision about whether or not to apply the new law retroactively without resolving the underlying constitutional question here raised (and raising, we believe, serious additional constitutional questions if retroactivity were decreed).

For the above reasons, we submit that this appeal cannot be considered moot unless and until Appellee files a stipulation that it no longer has any legal basis for pursuing its claim against Appellant and does not intend to do so.

V. The Decision Below Does Not Rest on Any Adequate State Ground.

As in the previous section of this brief, Appellant does not quarrel with the general statement of law in Part III of Appellee's brief that an appeal to this Court is improper where the decision below rests on an independent and adequate state ground. One of the most common situations of that kind is a decision by the highest court of a state that a statute is invalid under not only the U.S. Constitution, but also under the corresponding provision of their state constitution.

Because the outcome of the case would be unchanged by any disposition of the federal constitutional question this Court might make, such constitutional questions will not invoke this Court's jurisdiction. No such circumstances exist in the instant case, however, since none of the three rulings treated by Appellee is such an independent state ground.

Two of the three rulings - the second and third from Appellee's brief - may be quickly dealt with. The third one mentioned--the procedural rule created by the Georgia Supreme Court to preclude any ruling by it on the merits of Appellant's constitutional claim--is itself under constitutional challenge in this appeal. We submit that that rule should therefore be disposed of by this Court as urged in Appellant's Jurisdictional Statement. The second ruling referred to, that this Court's ruling in Orr v. Orr, 440 U.S. 268 (1979) "should not be given retroactive effect," is not even a state ground at all, but is a federal ground. It is axiomatic that this Court is the final arbiter of the interpretation and applicability of provisions of the Constitution of the United States. This includes the degree to which new applications of Constitutional principles will be retroactively applied. Indeed, this Court has not only made such rulings on many occasions, but has established detailed standards for deciding whether or not court rulings will be applied retroactively. See extensive discussion in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

The first of the three rulings--that the trial court based her ruling on a principle of common law rather than, or in addition to, former Ga. Code Ann. §74-105--requires a bit more explanation, for the trial court's order (Conclusion of Law No. 2) does refer to the father's "common law obligation" to support a minor child. Under Georgia law, however, this cannot be an independent state ground (apart from the statutory section), for Ga. Code Ann. §74-105 and the common law support obligation are literally one and the same.

For historical reasons that can only be touched upon here, the Georgia Code consists of a numerically-arranged series of provisions, only some of which are "laws" in the sense usually thought of when discussing state codes. Some of them (the majority) are specific enactments

of the Georgia legislature whose language derives verbatim from a particular legislative act: these are identified in the Georgia Code Annotated not only by code section number (e.g., §74-105), but also by Act number (e.g., Acts 1979, pp. 466, 492, which is now Ga. Code Ann. §74-105, or Acts 1869, p. 132, which is codified as Ga. Code Ann. §75-208). Others, including former Ga. Code Ann. §74-105, are not enactments of the Georgia legislature at all, but are mere concise statements of principles of the common law rule as applied in Georgia, written by a Commission established for that purpose in the mid-19th Century. These were written into the Georgia Code of 1863 in order that all principles of Georgia law, whether derived from English Common Law or from Georgia legislation, might be found in the same place by ordinary people, instead of requiring research by a lawyer or a law librarian. In theory, therefore, since 1863 there has been no principle of common law applicable in Georgia that is not codified in some form in the Georgia Code. A short explanation of this principle appears in the Explanatory Note at the beginning of Volume 1 of the Georgia Code Annotated, at page xxii, a copy of which is attached to this brief as Exhibit "B." If the Court desires further authority for the proposition set forth in this paragraph, Appellant will be happy to file a supplemental brief for that purpose.

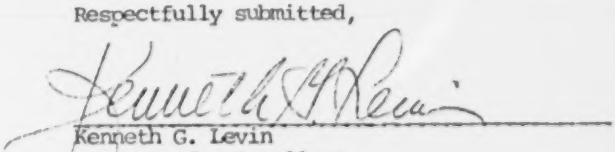
Because of the situation just described, a challenge to the constitutionality of a code section such as former Ga. Code Ann. §74-105 is exactly the same thing as challenging the Georgia common law rule on the subject. Thus, when the trial court referred to the Appellant's alleged common law obligation, she could have only been referring to Ga. Code Ann. §74-105. By definition, therefore, this could not be an independent state ground upon which her ruling, or any decision involving former Ga. Code Ann. §74-105, could rest.

Since one of the three rulings relied upon by Appellee in this portion of its brief is not a state but a federal ground, another is itself an unconstitutional rule under challenge in this appeal, and the third is not an independent state ground, the constitutional questions presented by this appeal are necessary foundations of the Court's rulings below and are properly presented to this Court.

VI. Conclusion.

This appeal presents two distinct constitutional questions, one of which lies within this Court's mandatory appeallate jurisdiction and the other within the certiorari jurisdiction. For administrative reasons, this case has been docketed as an appeal. Virtually the entirety of Appellee's brief in support of its Motion to Dismiss or Affirm has addressed itself to the point of law within the appeal jurisdiction of the Court, but, for the reasons hereinbefore stated, none of these arguments has merit. It is noteworthy that Appellee has had almost nothing to say about the certiorari challenge to the Georgia Supreme Court's barrier to raising the constitutional question, which likewise presents a very important matter to this Court. Thus, for the reasons set forth herein and in the Jurisdictional Statement, Appellant respectfully urges that this Court review his appeal and petition on one or both constitutional grounds, and reverse and remand for further proceedings.

Respectfully submitted,



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support for his 18 year old child was without merit. 241/331 (245 S. E. 2d 290).

Agreement providing support until child becomes of age rendered prior to adoption of code section means support payments must continue until child reaches 21 years of age. 244/606 (261 S. E. 2d 388).

74-105 (3030) Parents' obligation to child

Until majority, it is the joint and several duty of each parent to provide for the maintenance, protection, and education of the child, except to the extent that the duty of one parent is otherwise or further defined by court order.

(Acts 1979, pp. 466, 492, eff. April 4, 1979.)

Editorial Note

Acts 1979, pp. 466, 492, entirely superseded the former section.

This 1979 Act, which extensively amended Title 30, and which also amended Chapters 53-5, 74-1, 74-2, 99-9A, 105-12, and 105-13, provides at Section 1 thereof as follows:

"It is the intent of this Act to revise and modernize certain laws of this State which relate to intrafamilial duties, rights, and obligations, including laws relating to divorce, alimony, support of minors, husband and wife, parent and child, enforcement of support, and related matters, so as to comply with those standards of equal protection under the law announced in the United States Supreme Court decision in the case of *Orr v. Orr*, decided March 5, 1979. This Act and the provisions hereof shall be liberally construed to effectuate the purposes of this Act.

"It is the intent of the General Assembly and of this Act that no contract made or judgment, order, or decree rendered prior to the effective date of this Act should be overturned, modified, or disturbed by reason of the provisions of this Act and that no such contract, judgment, order, or decree should be overturned, modified, or disturbed except to the extent absolutely required by the Constitution of this State or of the United States. Nothing in this Act, however, shall be construed to prohibit modification of judgments, decrees, or orders to the extent such modification is expressly authorized by statute. Nothing in this Act shall be construed to authorize any court to entertain any claim of Constitutional right, which claim is barred because it was not timely raised in any previous judicial proceeding. This Act shall be construed to effectuate its intent to insure the well-being of the people of this State by insuring, wherever possible, continuity of administration, validity, and execution of all existing provisions whether judicial, contractual, or otherwise for support of people of this State."

ANNOTATIONS

Applied. 244/32 (257 S. E. 2d 537).

Child support

In action to revise award of child support, once evidence has been introduced showing substantial change in income or financial status of former husband, evidence relative to former wife's income or financial status is admissible. 244/197 (259 S. E. 2d 453).

Constitutionality

Questions concerning constitutionality of State's alimony laws could not be raised in contempt proceedings if such issues were not timely and properly raised at trial. Dismissal of attachment for contempt was reversed. 243/736 (256 S. E. 2d 465).

Statutes under which appellee was awarded alimony and child support were unconstitutional and appellant was entitled to new trial on issues of alimony and child support only. Appellant's contention that award of attorney's fees was excessive was without merit. 243/763 (256 S. E. 2d 446).

Where defendant answered with general denial of debt, but amended his answer four years later to include constitutional challenge to section under *Orr v. Orr*, constitutional question was not timely raised. Defendant will not be allowed to delay asserting his defenses indefinitely in hope that decision will be rendered which provides him with arguable constitutional defense. 245/445.

Exhibit "A"

omitted and the reason for their omission. A similar table shows where the Acts from 1910 to date have been codified and why certain Acts or sections of Acts have been omitted.

At the end of each section, in parentheses, is shown the source from which the section is codified. Where more than one Act is cited, the meaning, of course, is that the later Act or Acts amend or modify the earlier. Citation of a case following an Act indicates that the decision cited modifies the section as it was adopted originally. In a considerable number of cases, sections have been codified from decisions of the Supreme Court, and these decisions are given as the sources of the sections so derived.

Where no source note is shown, the section usually has come down without change from the Code of 1863, stating a principle of the common law which was included in that Code pursuant to the authority given to the Commissions to include therein the entire body of law of force in this State, from whatever source derived.

Where the source of a section is an Act antedating Cobb's New Digest, published in 1851, the citation is to the Digest rather than to the session laws. This is because the volumes containing the session laws prior to 1800 are practically nonexistent, and all those prior to 1851 are exceedingly rare. A reference to the Act of a particular year, followed by "Cobb," etc., means an Act adopted in the year indicated, and included in Cobb's Digest at the given page.

Cobb's Digest contains the Penal Code of 1833 as amended up to the time of the publication of the Digest. A reference to a section of that Code is simply to the page in "Cobb" on which it appears, no Act being cited.

Editorial Notes

Sometimes it has seemed desirable to give the history of a section, to point out its possible unconstitutionality, to explain a change in it, or to call special attention to some other section or Title in connection with it. Editorial notes have been freely used for such purposes. It is hoped that they will be of assistance in the intelligent use of the Code. The Title embodying the Constitution of Georgia, especially, is liberally furnished with such notes.

General Laws of Local Application

The practice has grown up of evading the provision of the Constitution forbidding the enactment of a "special law in any case for which provision has been made by an existing general law," by passing laws general in form but with operation limited to counties having a certain population, or to those containing cities of a certain size. In nearly every case the limits are so fixed as to embrace only a single county. The Code of 1910 contains a considerable number of such laws. At the time that Code was adopted this type of legislation was just beginning. The volume of

Exhibit "B"